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No. 91-1563

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

AIU INSURANCE COMPANY, AMERICAN FIDELITY COMPANY, AMERICAN HOME ASSURANCE COMPANY, BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA, COMMERCE AND INDUSTRY INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NEW HAMPSHIRE INDEMNITY COMPANY, INC., and NEW HAMPSHIRE INSURANCE COMPANY,

Petitioners,

v.

SUPERINTENDENT, MAINE BUREAU OF INSURANCE,

Respondent.

Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether it violated due process for a state court to hold that *res judicata* could be applied to parties who were in privity with a litigant in a prior action.

2. Whether it violated due process for a state court to hold that parties who did not seek timely judicial review of an administrative order were precluded from challenging that order in a subsequent action.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 10

1. This Court's decision in Martin v. Wilks was based upon an interpretation of the Federal Rules of Civil Procedure 13

2. The decision below is not inconsistent with Martin v. Wilks 14

3. The decision below rests upon an adequate and independent state ground 18

4. Petitioners' policy arguments are overblown and unsound 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

Aetna Insurance Co. v. Hyde, 275 U.S. 440 (1928) 19

Bar Harbor Banking & Trust Co. v. Alexander, 411 A.2d 74 (Me. 1980) 6

California State Automobile Association v. Maloney, 341 U.S. 105 (1951) 20

Chase National Bank v. Norwalk, 291 U.S. 431 (1934) 15

Currier v. Cyr, 570 A.2d 1205 (Me. 1990) 19

Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989) 10, 11, 20

First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) 12

FPC v. Hope Natural Gas, 320 U.S. 591 (1944) 10

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 18

Hansberry v. Lee, 311 U.S. 32 (1940) 18

Maine Central R.R. v. Town of Dexter, 588 A.2d 289 (Me. 1991) 22

Maines v. Secretary of State, 493 A.2d 326 (Me.), *cert. denied*, 474 U.S. 947 (1985) 21, 23

Martin v. Wilks, 490 U.S. 755 (1989) ... 13, 14, 15, 17, 18

Migra v. Warren City School District Board of Education, 465 U.S. 75 (1984) 18

Moffett v. City of Portland, 400 A.2d 340 (Me. 1979) 6

NCCI v. Superintendent of Insurance, 481 A.2d 775 (Me. 1984) 3, 4

NCCI v. Superintendent of Insurance, 538 A.2d 759 (Me. 1988) 8

TABLE OF AUTHORITIES – Continued

Page

Nevada v. United States, 463 U.S. 110 (1983)..... 18

Panza v. Armco Steel Corp., 316 F.2d 69 (3d Cir.) *cert. denied*, 375 U.S. 897 (1963)..... 17

Parsons Steel Inc. v. First Alabama Bank, 474 U.S. 518 (1986)..... 18

Permian Basin Area Rate Cases, 390 U.S. 747 (1968)..... 10

Standish Telephone Co. v. Saco River Tel. & Tel. Co., 555 A.2d 478 (Me. 1989)..... 21

State v. Reny, 511 A.2d 1066 (Me. 1986)..... 21, 23

Town of North Berwick v. Jones, 534 A.2d 667 (Me. 1987)..... 21

UAW v. Brock, 477 U.S. 274 (1986)..... 13

Utah Power & Light Co. v. ICC, 764 F.2d 865 (D.C. Cir. 1985)..... 17

Warth v. Seldin, 422 U.S. 490 (1975)..... 20

Webb v. Webb, 451 U.S. 493 (1981)..... 17

STATUTES AND REGULATIONS

1985 Maine Acts, ch. 372..... *passim*

1987 Maine Acts, ch. 559, § 3..... 8

24-A Me.Rev.Stat.Ann. § 236 (1990)..... 3

24-A Me.Rev.Stat.Ann. § 415-A (1990)..... 8

24-A Me.Rev.Stat.Ann. §§ 2309-10 (Supp. 1991)..... 3

24-A Me.Rev.Stat.Ann. § 2338 (Supp. 1986) (repealed 1987))..... 5

TABLE OF AUTHORITIES – Continued

Page

24-A Me.Rev.Stat.Ann. § 2355 (Supp. 1986) (repealed 1987) 5

24-A Me.Rev.Stat.Ann. § 2363 (1990) 3

39 Me.Rev.Stat.Ann. § 22-D(7) (repealed 1988) 3

Civil Rights Act of 1991, Pub.L.No. 102-166, 105 Stat. 1071 § 108 (1991), enacting 42 U.S.C. § 2000e-2(n) 14

MISCELLANEOUS

18 C.Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4452 (Supp. 1992) 14

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AIU INSURANCE COMPANY, AMERICAN FIDELITY COMPANY, AMERICAN HOME ASSURANCE COMPANY, BIRMINGHAM FIRE INSURANCE COMPANY OF PENNSYLVANIA, COMMERCE AND INDUSTRY INSURANCE COMPANY, GRANITE STATE INSURANCE COMPANY, INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., NEW HAMPSHIRE INDEMNITY COMPANY, INC., and NEW HAMPSHIRE INSURANCE COMPANY,

Petitioners,

v.

SUPERINTENDENT, MAINE BUREAU OF INSURANCE,

Respondent.

Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Richard E. Johnson, Acting Superintendent of the Maine Bureau of Insurance, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion of the Maine

Supreme Judicial Court issued on December 31, 1991 and reported at 600 A.2d 1115 (Me. 1991) (App. 2a-8a).[1]

STATEMENT OF THE CASE

Because petitioners' statement of facts is incomplete and inaccurate in significant respects, the Superintendent provides the following statement of material facts:[2]

This lawsuit involves a challenge to workers' compensation legislation enacted in the State of Maine in 1985. The legislation in question, 1985 Maine Acts, ch. 372 ("the 1985 Act"), mandated significant reductions in the benefits to be paid to injured employees and required offsetting cuts in insurance rates as part of a transition period to a system under which insurers would be able to set their own rates.

Prior to the 1985 Act, workers' compensation rates in Maine resulted from a process whereby rate proposals were submitted by the National Council on Compensation Insurance ("NCCI") on behalf of its member-insurers, and those proposed rates were either approved

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[1] References to "App. ___" are to the pages of the Appendix included with the Petition for a Writ of Certiorari.

[2] To the extent that these facts are not contained in the Appendix to the Petition, they are contained in the Affidavit of Richard Johnson of the Maine Bureau of Insurance, which was sworn to on May 31, 1990 and submitted in support of the Superintendent's Motion to Dismiss or for Summary Judgment filed in the Maine Superior Court on June 1, 1990. None of the facts contained in this affidavit were controverted by petitioners.

or disapproved by the Superintendent.[3] NCCI is a nationwide organization of workers' compensation insurers to which petitioners have belonged at all relevant times. NCCI is authorized in Maine to file workers' compensation rate proposals on behalf of its member insurers and is entitled to bring court challenges to rate orders issued by the Superintendent. *See* 24-A Me.Rev.Stat.Ann. §§ 2309-10 (Supp. 1991); *id.* § 236 (1990); *NCCI v. Superintendent of Insurance*, 481 A.2d 775 (Me. 1984) (*"NCCI 1"*).[4]

In 1980 NCCI filed for a rate increase, which was approved. In the next three years NCCI sought further rate increases, all of which were disapproved, principally because of NCCI's failure to provide required information consisting of the projected investment income of

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[3] At that time the Superintendent had no authority to modify a filing but was required either to approve or disapprove proposed rates in their entirety. *See NCCI v. Superintendent of Insurance*, 481 A.2d 775, 781 (Me. 1984). In the 1985 Act, the Superintendent was given authority to approve a rate increase in an amount other than the amount requested. 1985 Maine Acts, ch. 372, Part B, § 8, *enacting* 39 Me.Rev.Stat.Ann. § 22-D(7) (repealed 1988 and replaced by 24-A Me.Rev.Stat.Ann. § 2363 (1990)).

[4] The 1985 Act did not alter NCCI's role with respect to the assigned risk pool but made several changes in NCCI's role with respect to rate rulings in the voluntary market, eliminating joint rate filings while continuing to authorize NCCI to file certain essential rate data. These changes are not material to the issues in this case since they were not made effective until January 1, 1986 – after NCCI brought the lawsuit which formed the basis for the Superintendent's *res judicata* defense in the instant case.

NCCI's member insurers under its proposed rates. *See NCCI 1*, 481 A.2d at 778-80, which rejected NCCI's challenge to the Superintendent's order disapproving NCCI's 1982 rate filing. NCCI did not seek judicial review of the Superintendent's orders disapproving its rate filings in 1981 and 1983, and NCCI did not file for any rate increases in either 1984 or 1985. Although workers' compensation *rates* thus held steady for several years, the total amount of premium income received by insurers continued to increase because workers' compensation rates are applied as a percentage of payroll, and overall payrolls increased in Maine from 1981 to 1985.

The 1985 Act, which was enacted on June 18, 1985, was designed to respond to perceived problems in the workers' compensation system. The Act contained three major elements. The first element involved cuts in the benefits to be paid to injured employees, including (1) a three year freeze of the maximum weekly benefit; (2) a cap on the annual inflation adjustment; (3) limitation of certain benefits to two-thirds of the average weekly wage regardless of the claimant's actual wage; (4) a requirement that weekly wage benefits be reduced by 50% of social security benefits and by after tax benefits received from certain employee benefit plans; (5) restriction of attorneys' fee awards to claimants; and (6) amendment of certain procedural rules that were perceived as being too favorable to claimants. 1985 Maine Acts, ch. 372, Part A, §§ 15, 17, 19-21, 25-26, 34, 43, 45.

The second element of the 1985 Act involved the establishment of safety and rehabilitation programs designed to reduce the amount paid out in benefits to workers compensation claimants. *Id.* §§ 6-7, 23, 29. Like

the Act's statutory cuts in benefits, therefore, the safety and health programs were intended to reduce the amounts which workers' compensation insurers in Maine were required to pay.

The third element of the 1985 Act involved the phased deregulation of workers' compensation rates over a three-year period. 1985 Maine Acts, ch. 372, Part B, § 5. Beginning in 1989 insurers would generally be able to set their own rates in the voluntary market on a "use and file" basis, subject to limited review by the Superintendent after the rates were in effect. 24-A Me.Rev.Stat.Ann. § 2338 (Supp. 1986) (repealed 1987). Rates in the assigned risk pool would continue to be subject to prior approval by the Superintendent. During the transition period, in order to reflect the rate effect of the statutory cuts in benefits described above, rates were required to be reduced by at least 8% for the period from August 1, 1985 to the end of 1986. In addition, rate increases during 1987 and 1988 were limited to 10% each year. 24-A Me.Rev.Stat.Ann. § 2355 (Supp. 1986) (repealed 1987).

In August of 1985 the Superintendent issued an interim order implementing the 8% rate reduction required by the transition provisions of the 1985 Act effective as of August 1, 1985. (App. 56a).[5] NCCI and Liberty Mutual Insurance Company thereafter filed a lawsuit in Maine Superior Court claiming that, notwithstanding the offsetting cuts in benefits, the statutory 8% reduction for 1985 and the 10% limitation on rate

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[5] Contrary to petitioners' contentions (Petition at 4), neither the 1985 Act nor the Superintendent's interim order made the 8 percent reduction retroactive to January 1, 1985.

increases for 1987 and 1988 were confiscatory and unconstitutional. *NCCI v. Superintendent of Insurance*, Docket No. CV-85-459 (Maine Superior Court, Kennebec County, filed September 20, 1985) ("*NCCI 2*"). NCCI's complaint sought declaratory and injunctive relief against the rate limitations in the 1985 Act. (*See* App. 98a-99a). At the outset, NCCI sought a preliminary injunction against the 8% reduction mandated as of August 1, 1985 by the 1985 Act and the Superintendent's interim order, but this request was denied in a ruling from which no appeal was sought.[6] (App. 56a).

NCCI thereafter held its lawsuit in abeyance pending administrative hearings to determine whether a rate reduction in excess of 8% would be appropriate in view of the statutory cuts in benefits. (*See* App. 56a). After the Superintendent issued a decision in October 1986 ruling that the reduction would be limited to 8%, an eight-day trial was held before the Maine Superior Court on NCCI's challenges to the rate limitations contained in the 1985 Act and on related appeals from orders entered by the Superintendent in connection with those rate limitations and in connection with the operation of the assigned risk pool. By this time challenges brought by several individual insurers had been consolidated with the NCCI lawsuit.

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[6] Although there is no automatic right to appeal from the denial of a preliminary injunction in Maine, an appeal may be taken if it can be shown that sufficiently irreparable harm will ensue or if there are other policy reasons favoring review. *E.g., Moffett v. City of Portland*, 400 A.2d 340, 343 (Me. 1979); *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 76-77 (Me. 1980).

On May 14, 1987, the Maine Superior Court affirmed the Superintendent's August 1985 interim order and entered a declaratory judgment that the 1985 Act was constitutional. (App. 50a-91a). Like the Superintendent, the Superior Court found that the benefit reductions mandated by the 1985 Act exceeded the 8% reduction in rates so that the net effect of the new rates was the equivalent of a rate increase. (App. 70a-71a).[7] The Superior Court also affirmed the Superintendent's finding that the rates, although projected to yield a below market return, would nevertheless allow workers compensation insurers to operate at an expected profit. (App. 69a, 74a-75a).

Because the insurers' expected profit under the transitional provisions imposed by the 1985 Act fell below market rates, the Superior Court found that the rates of return available to insurers fell below the range that would constitute a reasonable rate of return. (App. 74a). Nevertheless, the Superior Court held that there was no unconstitutional confiscation because state regulation does not guarantee a profit for every insurance company, because insurers could freely withdraw from the voluntary market, and because the rates under the transitional provisions of the 1985 Act did not lead to results that were materially worse than those experienced by the property and casualty insurance industry as a whole. (App. 87a-88a).

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[7] This demonstrates the misleading nature of petitioners' repeated characterizations of the 1985 Act as a rate "rollback." *E.g.*, Petition at 2-4.

With respect to the insurers' complaints about the assigned risk pool, the court found no unconstitutional confiscation as long as the insurers in that pool could withdraw from the Maine market. (App. 79a-80a, 85a-86a, 89a). The court further found that since none of the complaining insurers had ever initiated steps to withdraw from the Maine workers' compensation insurance market, they were not in any position to complain that they were not free to exercise their right to withdraw pursuant to 24-A Me.Rev.Stat.Ann. § 415-A (1990). (App. 86a-87a, 89a).

Five months later, in October of 1987, the ten affiliated companies who are the petitioners in this case filed withdrawal plans with the Superintendent. All of these plans were approved within one day, effective on December 31, 1987.

In the meantime, NCCI appealed the Superior Court's decision in *NCCI 2* to the Maine Supreme Judicial Court. While that appeal was pending, the challenged provisions of the 1985 Act were repealed. 1987 Maine Acts, ch. 559, § 3. Because NCCI had sought only prospective relief enjoining the rate limitations in the 1985 Act, the Maine Supreme Judicial Court dismissed NCCI's appeal as moot. *NCCI v. Superintendent of Insurance*, 538 A.2d 759 (Me. 1988).[8]

Sixteen months later, in July 1989, petitioners commenced the instant lawsuit, repeating NCCI's allegations that the transitional rate limitations were confiscatory but

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[8] A copy of this decision, mislabeled as a decision of the Superior Court, appears in Petitioner's Appendix at 39a-49a.

this time asking for retroactive monetary damages in excess of $50 million from the Superintendent. In response, the Superintendent argued that a regulated entity subjected to an allegedly confiscatory rate did not have a cause of action for retroactive monetary damages against the ratemaker; its remedies were limited to prospective relief and relief within the context of ratemaking.[9] Alternatively, the Superintendent raised a *res judicata* defense based, *inter alia*, on the litigation in *NCCI 2* and the existence of privity between NCCI and petitioners.

The Superintendent thereafter filed a motion to dismiss or in the alternative for summary judgment based on petitioners' failure to state a claim and on *res judicata*. On January 2, 1991, the Maine Superior Court granted the Superintendent's motion. It stated that it was unaware of any decision in any jurisdiction which had held that persons in a regulated industry could bring a cause of action for monetary damages against a public ratemaking authority. (App. 12a). Nevertheless, it ultimately bypassed that issue and ruled that petitioners had in any event failed to state a cognizable claim under the takings clause. (App. 14a-27a). In the course of its decision, the court stated that it did not find *res judicata* to be applicable. (App. 12a-13a).

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[9] Thus, the Superintendent argued that while a regulated entity is entitled to prompt judicial review of any ratemaking order and might be entitled, in a proper case, to future rate relief to remedy past confiscation (if such were proven), it could not wait four years after a rate goes into effect and then sue for compensatory damages as petitioners had attempted to do in this case.

On appeal, the Maine Supreme Judicial Court also bypassed the issue of whether regulated industries can assert a cause of action for monetary damages against a ratemaker. It assumed, without deciding, that such a cause of action existed (App. 6a), but disagreed with the Superior Court and ruled that petitioners' claims were barred by *res judicata*. (App. 3a, 5a-8a).

REASONS WHY THE PETITION SHOULD BE DENIED

At the outset, because of the manner in which petitioners have attempted to frame the issues in this case, two points should be made. First, petitioners are complaining about ratemaking – a process which this Court has noted is far from an exact science. *See Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989), *quoting Permian Basin Area Rate Cases*, 390 U.S. 747, 790 (1968) ("[N]either law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders"). Moreover, rates are not necessarily invalid even though they may produce only a "meager return." *Duquesne Light Co. v. Barasch*, 488 U.S. at 310, *quoting FPC v. Hope Natural Gas*, 320 U.S. 591, 605 (1944). Under the transitional provisions of the 1985 Act both the Superintendent and the Maine Superior Court found that insurers would receive the equivalent of a modest rate increase. Although petitioners, like NCCI before them, complain that this increase was inadequate, such a claim does not – contrary to petitioners' assumption – automatically translate into an unconstitutional taking and certainly does not present the massive injustice portrayed by petitioners.

Second, the Superintendent has consistently maintained throughout this litigation that regulated entities have no cause of action for monetary damages against a ratemaker based on allegedly confiscatory rates. Indeed, petitioners have never cited a single case involving ratemaking in which any court has held that a ratemaker can be held accountable in damages for a confiscatory rate. If retroactive damage claims such as those asserted in this case were allowed, the threat of such claims would be prohibitive – particularly under petitioners' theory that regulated entities can bring suit years after the challenged rates go into effect for what they now describe as "hundreds of millions of dollars." (Petition at 15). If such a cause of action were allowed, it would eliminate ratesetting by governmental entities. For this reason, the relevant judicial decisions have always recognized that "just compensation" in the context of rate-setting means an adequate rate, not monetary damages. *See Duquesne Light Co. v. Barasch*, 488 U.S. at 308. This means that regulated entities are entitled to seek relief setting aside constitutionally deficient rates. In an appropriate case, they might also be entitled to future rate relief to remedy the effects of past confiscation, but they may not seek to hold the ratemaker liable for damages.

Because the Maine Supreme Judicial Court did not rule on this issue, resting its decision instead upon *res judicata*, the issue of whether a cause of action for monetary damages can be asserted against a ratemaker is not before this Court.[10] In the discussion that follows, however,

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[10] However, the above discussion demonstrates the fallacy of petitioners' contention (Petition at 13) that the decision

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it should be emphasized that the Superintendent does not concede that any such cause of action exists.

Turning to the *res judicata* issue upon which the decision below was based, the Superintendent is obliged to point out that it is questionable whether petitioners adequately raised the federal issue on which they now seek review. Notwithstanding Sup. Ct. Rule 14.1(h), petitioners have not specified when and how the federal question presented by their petition was raised in the courts below. In fact, although petitioners concede that the Superintendent raised a *res judicata* defense from the outset of the case (Petition at 7), petitioners never suggested in the trial court that the doctrine of *res judicata* could not constitutionally be applied to their claims but argued only that the doctrine was inapplicable in this case. On appeal, petitioners' only reference to any alleged due process problem with the application of *res judicata* was contained in a single sentence of the reply brief that they filed on June 7, 1991 in the Maine Supreme Judicial Court.[11] Under these circumstances, it is not surprising

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below thwarts this Court's ruling in *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987). *First English* was not a ratesetting case. Moreover, no *res judicata* issue was raised in *First English*. As a result, *First English* is in no way inconsistent with the decision of the Maine Supreme Judicial Court in this case.

[11] That sentence appeared at the conclusion of an argument that claim preclusion was inapplicable. After arguing that

(Continued on following page)

that the Maine Supreme Judicial Court did not address the constitutional argument upon which petitioners now seek review.

Even assuming for the sake of argument, however, that petitioners adequately raised their due process objection, their petition should be denied because, as discussed in more detail below, (1) the opinion on which the petition is based, *Martin v. Wilks*, 490 U.S. 755 (1989), was based on an interpretation of the Federal Rules of Civil Procedure rather than due process; (2) in any event, there is no inconsistency between the decision below and *Wilks;* and (3) the decision below is based on an adequate and independent state ground.

1. This Court's decision in Martin v. Wilks was based upon an interpretation of the Federal Rules of Civil Procedure.

The sole basis upon which petitioners seek review is an alleged inconsistency between the decision below and this Court's opinion in *Martin v. Wilks*, 490 U.S. 755

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NCCI could not have sued for damages on their behalf, petitioners stated, "it would therefore deprive appellants of their right to due process to bind them as the result of NCCI's failure to assert a damages claim on their behalf." Appellants' Reply Brief dated June 7, 1991, at 18. This was followed by a citation to *UAW v. Brock*, 477 U.S. 274, 290 (1986) and a footnote which read, "Assuming that appellants *could* have intervened in *NCCI*, they had no obligation to do so. *See Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989)." Appellants' Reply Brief dated June 7, 1991, at 18 n.11 (emphasis in original).

(1989). Although petitioners argue that the *Wilks* opinion was based on the due process clause, the text of the *Wilks* decision demonstrates that it rests instead upon an interpretation of Rules 19 and 24 of the Federal Rules of Civil Procedure. *See, e.g.*, 490 U.S. at 763-65. Indeed, the Court expressly noted that acceptance of the policy arguments made by the petitioners in *Wilks* "would require a rewriting . . . of the relevant Rules." *Id.* at 767. Commentators have agreed that the principle enunciated in *Wilks* can be altered by rule or legislation. *See* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4452 (Supp. 1992) at 285-86. Indeed, Congress has altered the *Wilks* rule with respect to employment discrimination cases in the Civil Rights Act of 1991. Pub.L.No. 102-166, 105 Stat. 1071 § 108 (1991), enacting 42 U.S.C. § 2000e-2(n).

As a result, even assuming that there were some inconsistency between the decision below and *Wilks*, this would not demonstrate any constitutional infirmity in the decision below. As discussed immediately below, however, the Maine Supreme Judicial Court's decision in this case is entirely consistent with the decision in *Wilks*.

2. The decision below is not inconsistent with *Martin v. Wilks*.

In *Martin v. Wilks* there was an express finding in the court below that the white firefighters were neither parties nor privies to the consent decrees which they were seeking to challenge. *See* 490 U.S. at 761. Moreover, the *Wilks* decision expressly recognized that the rule which it enunciated – that a person is not barred by a judgment

entered in litigation to which he or she was not a party – would not apply if the party sought to be bound was in privity with a prior litigant. Thus, the Court, quoting Justice Brandeis in *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934), expressed the general principle underlying its decision in the following terms: "Unless duly summoned to appear in a legal proceeding, a person *not a privy* may rest assured that a judgment recovered therein will not affect his legal rights." 490 U.S. at 763 (emphasis added). *See also* 490 U.S. at 762 n.2.

In the instant case, as the Maine Supreme Judicial Court noted, "it is uncontested that the insurers [petitioners AIU *et al.*] are in privity with the National Council on Compensation Insurance with respect to the litigation in *NCCI 2*." (App. 5a).[12] On the face of the decision below, therefore, there is no inconsistency with *Martin v. Wilks* since the instant case falls into the express exception recognized in *Wilks* for parties who are in privity with a prior litigant.

Moreover, the Maine Supreme Judicial Court cannot be faulted for finding privity to be uncontested in this case because the existence of privity is amply demonstrated by petitioners' own admissions in the Superior Court. The papers filed by petitioners in the Superior Court stated, in referring to *NCCI 2*, that " . . . plaintiffs concede that their interests were represented by NCCI, an

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[12] The Superior Court also concluded that petitioners were in privity with NCCI. (App. 12a).

association to which plaintiffs belong . . . "[13] In responding to another of the Superintendent's arguments, petitioners went even further, stating that "plaintiffs communicated their opposition to the 1985 Act rate levels by *their participation* in the *NCCI 2* litigation which was filed immediately after [the Superintendent] entered his 8 percent rollback order."[14] Given petitioners' candid acknowledgement below that they participated in the *NCCI 2* litigation, they cannot now attack the existence of privity in this Court.

This also disposes of petitioners' newly-minted suggestion that it was never alleged or proven that petitioners had notice of the NCCI litigation (Petition at 11). It is disingenuous for petitioners to intimate in this Court that they did not have notice of *NCCI 2* when they acknowledged their "participation" in that case in their papers below. Moreover, petitioners never in any manner raised any issue with respect to notice in the proceedings below. If petitioners wished to object to the application of *res judicata* based on the Superintendent's failure to plead

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[13] Plaintiffs' Memorandum in Response to Motion to Dismiss or For Summary Judgment, dated July 25, 1990 and filed in *AIU Insurance Co., et al. v. Superintendent of Insurance*, Superior Court Cumberland County, Docket No. CV-89-963, at 17 n.11. Petitioners went on to contend that although their interests were represented by NCCI, they were not raising the same claim litigated in *NCCI 2* and their claims could not have been litigated in that proceeding.

[14] Plaintiffs' Memorandum in Response to Motion to Dismiss or For Summary Judgment, dated July 25, 1990, at 29 (emphasis added).

and prove that they had notice of *NCCI 2*,[15] it was incumbent on petitioners to raise this issue in the courts below. They are not entitled to raise this issue for the first time in their petition for certiorari. *E.g., Webb v. Webb*, 451 U.S. 493, 495, 498-501 (1981).

In sum, this case squarely falls within the privity exception recognized in *Wilks*. The crucial difference between this case and *Wilks* is that, while the white firefighters in *Wilks* had not been represented by any party during the proceedings which led to the consent decrees, the petitioners in this case were directly represented by an industry association whose entire reason for being was to provide such representation. In finding *res judicata* based on privity under these circumstances, the decision below is entirely consistent with federal decisions that have found that prior litigation brought by trade associations and labor unions precludes subsequent claims by members of those associations. *E.g., Utah Power & Light Co. v. ICC*, 764 F.2d 865, 871 (D.C. Cir. 1985); *Panza v. Armco Steel Corp.*, 316 F.2d 69 (3d Cir. 1963), *cert. denied*, 375 U.S. 897 (1963).

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[15] Petitioners' arguments on this issue are carefully worded. They never directly contend that they did not have notice of the NCCI lawsuit, but only that the Superintendent never alleged such notice (Petition at 7) and they therefore state that there is "no basis . . . for concluding" that they were aware of the NCCI litigation (Petition at 11).

3. The decision below rests upon an adequate and independent state ground.

It is well-settled that, subject to the due process clause, state courts are entitled to determine for themselves the *res judicata* effects of their own judgments. *Parsons Steel Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986); *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 82 (1984). Thus, application of *res judicata* is a matter of state law, and the decision of the Maine Supreme Judicial Court in this case determining the *res judicata* effect of the state court proceedings in *NCCI 2* rests upon an adequate and independent state ground that forecloses review by this Court. *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

While state court interpretations of *res judicata* cannot violate due process, *Parsons Steel*, 474 U.S. at 523, petitioners' only suggestion that there was a violation of due process in the instant case is a claim that, as noted above, rests upon two demonstrably false premises – (1) that the result in *Martin v. Wilks* was dictated by due process instead of by this Court's interpretation of the federal rules of civil procedure, and (2) that the decision below is inconsistent with *Wilks*. The short answer to petitioners' arguments is that there is no violation of due process when preclusive effect is given to prior litigation conducted by an association whose only role is to represent its members and who specifically undertook the prior litigation for precisely that purpose. *See Nevada v. United States*, 463 U.S. 110, 135 (1983); *Hansberry v. Lee*, 311 U.S. 32, 41-43 (1940).

Petitioners' remaining contentions may be briefly disposed of. While they contend that NCCI only brought

a facial challenge to the constitutionality of the 1985 Act – allegedly leaving open a later attack on the Act as applied (Petition at 12-13) – this argument is belied by the fact that the Superior Court in *NCCI 2* conducted an eight-day trial and heard considerable evidence, including expert testimony from both sides, on the specific application of the 1985 Act to insurers writing workers' compensation insurance in Maine. (*See, e.g.*, App. 68a-75a). The NCCI litigation thus went far beyond a mere facial challenge to the 1985 Act. Moreover, even assuming that only a facial challenge had been brought would not alter the application of *res judicata* in this case since, under Maine law as well as under federal law, claim preclusion applies both to the claims that were previously brought and any claims that could have been brought. *See Currier v. Cyr*, 570 A.2d 1205, 1208-09 (Me. 1990).

Plaintiffs also suggest that some significance should be attached to the difference between an industry-wide claim of confiscation and a company-specific claim. (Petition at 12). This demonstrates a fundamental misunderstanding of rate-making in the context of insurance. In setting rates, the Superintendent was not obliged to set separate rates for each individual insurer so as to guarantee each insurer, no matter how inefficient, a reasonable rate of return. *See Aetna Insurance Co. v. Hyde*, 275 U.S. 440, 447 (1928) ("It has never been and cannot reasonably be held that state made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business"). At most, assuming that the doctrine

of confiscatory rate regulation applicable to public utilities is also applicable to insurance companies,[16] the Superintendent was obliged to set a single rate, applicable to all insurers and generally sufficient to provide them with an *opportunity* to earn a fair rate of return. *See Duquesne Light Co. v. Barasch*, 488 U.S. at 310. As a result, any challenge to the rates set for insurers must necessarily consider the industry as a whole.

Petitioners also argue that the doctrine of *res judicata* is inapplicable to their claims because they contend that, under *Warth v. Seldin*, 422 U.S. 490 (1975), NCCI did not have standing to sue for damages on behalf of its members.

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[16] Although many courts have assumed that the same doctrine of confiscatory rate regulation applicable to public utilities is also applicable to rate regulation in the context of insurance, the Superintendent does not concede that this assumption is correct. As the Superior Court noted in *NCCI 2*, insurance companies differ from public utilities in that they can withdraw from a jurisdiction without leaving "useless wires in the air, pipes in the ground, or power plants on the land." (App. 80a). If insurers can voluntarily withdraw from a jurisdiction to avoid rates they perceive as inadequate, it is hard to see how there could be any confiscation, since it cannot be argued that insurers have a right to sell insurance in any given jurisdiction. *See California State Automobile Association v. Maloney*, 341 U.S. 105, 110 (1951) ("the power of the state is broad enough to take over the whole business [of insurance], leaving no part for private enterprise").

This issue is not before this Court because the Maine Supreme Judicial Court declined to reach it and instead rested its decision upon *res judicata*.

(Petition at 11).[17] In making this argument, petitioners simply ignore the ruling of the court below – which pointed out that if petitioners' claims of individualized injury were distinct from NCCI's challenge on behalf of its members as a class, then petitioners' claims were barred by the doctrine of administrative *res judicata* because they let the Superintendent's orders become final and did not file timely challenges to those orders on their own behalf. (App. 7a). This principle, based on Restatement (Second) of Judgments § 83 (1982), is well-settled under Maine law and has been applied in a variety of contexts. *E.g., Maines v. Secretary of State,* 493 A.2d 326, 329-30 (Me.), *cert denied,* 474 U.S. 947 (1985); *State v. Reny,* 511 A.2d 1066, 1067 (Me. 1986); *Town of North Berwick v. Jones,* 534 A.2d 667, 670-71 (Me. 1987); *Standish Telephone Co. v. Saco River Tel. & Tel. Co.,* 555 A.2d 478, 480-82 (Me.

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[17] Petitioners do not contest the Maine Supreme Judicial Court's finding that their damage claims could have been asserted at the time of *NCCI 2* (App. 6a-7a) except to argue that they cannot be bound with respect to the Superintendent's 1987 rate order because it was not issued until after the trial in *NCCI 2* (Petition at 8 n.7, 12 n.11). The Superior Court's decision in *NCCI 2*, however, demonstrates that the 1987 rates were in fact challenged in that case, with all parties proceeding on the assumption (which proved correct) that the maximum 10 percent rate increase would be granted. (App. 61a). Moreover, neither petitioners nor anyone else sought timely judicial review of the actual 1987 rate order when it was thereafter issued by the Superintendent. As a result, any attack which petitioners might make on that order is barred by the doctrine of administrative *res judicata. See, e.g., Maines v. Secretary of State,* 493 A.2d 326, 329-30 (Me.), *cert. denied,* 474 U.S. 947 (1985).

1989); *Maine Central R.R. v. Town of Dexter*, 588 A.2d 289, 292 (Me. 1991). This issue, although dispositive of petitioners' claims, is never addressed in the petition.

Under these circumstances, the Maine Supreme Judicial Court was fully entitled to hold, as a matter of Maine law, that because petitioners had made no showing that they could not have intervened in *NCCI 2* or that they were in any way prevented from asserting their monetary damage claims at that time, their claims for monetary damages were barred in the instant case.[18] Regardless of whether this Court would apply the doctrine of administrative *res judicata* in the same manner, the Maine Supreme Judicial Court did not violate due process in applying that doctrine in the instant case.[19]

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[18] All of this assumes that petitioners could have asserted a cause of action for monetary damages in the first place, a proposition which the Superintendent disputes for the reasons set forth above at 11.

[19] As noted above, petitioners never raised any argument in the Maine courts that they did not have notice of the NCCI litigation or could not have intervened in that litigation, as did several other insurers. *See* App. 62a-63a. In addition, petitioners' suggestion that they might not have had notice of *NCCI 2* is belied by the acknowledgement, in petitioners' Superior Court papers, of their "participation" in the *NCCI 2* litigation. In this connection, it bears emphasis that the Superintendent consistently argued below that if the claims now asserted by petitioners were not barred by *res judicata* because of petitioners' privity with NCCI, they would alternatively be barred by the doctrine of administrative *res judicata* because petitioners did not bring a timely challenge to the Superintendent's orders. *See* Superintendent's Memorandum of Law in Support of Motion to Dismiss or for Summary

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4. Petitioners' policy arguments are overblown and unsound.

The only remaining issues to consider are petitioners' policy arguments that the decision below, if left undisturbed, will inhibit associational representation and drive litigants into the federal courts. These arguments are both vastly overblown and analytically unsound. First, since both federal law and Maine law recognize that privity is an exception to the normal rule that *res judicata* does not bind nonparties, there is no reason why litigants would be forced into the federal courts as a result of the decision below and no reason why litigants in the position of petitioners would fare any better if they went to federal court.

Second, even assuming that there were some differences between federal law and Maine law on this issue, Maine is only one of fifty states and petitioners' scenario that the federal courts will somehow be flooded with millions of AARP members and other persons whose associations will be hindered from representing them is therefore extremely far-fetched. Moreover, the fact that some litigants may resort to federal court in order to take advantage of a more favorable federal interpretation of *res judicata* does not justify any encroachment on the authority of state courts to interpret state law doctrines of

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Judgment, filed in the Superior Court on June 1, 1990, at 14-15 (citing, *inter alia, Maines v. Secretary of State* and *State v. Reny*). Accordingly, if petitioners had any objection based on lack of notice, it behooved them to raise that objection in the courts below.

res judicata as they see fit, so long as there is no violation of due process.

In the final analysis, the decision below is actually quite limited, in keeping with the doctrine of privity. While petitioners here are in privity with NCCI, an organization which exists solely in order to represent workers compensation insurers including petitioners in connection with ratemaking and who brought the *NCCI 2* action in fulfillment of that function, it is not necessarily true that privity would always exist between other organizations and their members. Indeed, another premise of the decision below is that unless NCCI were representing petitioners' interests, petitioners would be bound by the doctrine of administrative *res judicata* as a result of their failure to seek timely judicial review of the Superintendent's orders. The effect of the decision below, therefore, is limited to those persons who are not only in privity with a prior litigant but who would otherwise be subject to administrative *res judicata*. As a result, the drastic effects predicted by petitioners if the decision below is not reviewed are wholly imaginary.

CONCLUSION

The petition for a writ of certiorari should be denied.

May 19, 1992

Respectfully submitted,

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